

June 6, 2005

Richard P. Doyle
LAN Engineering Corporation
1887 Business Center Drive, 2nd Floor, Suite 6
San Bernardino, CA 92408

**Re: Your Request for Advice
Our File No. A-05-104**

Dear Mr. Doyle:

This letter is in response to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the “Act”).¹ Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

May you, as a former employee of Caltrans, work on the Transportation Management Center (“TMC”) project for Caltrans-District 8 as a compensated employee of Lim and Nascimento Engineering Corporation?

CONCLUSION

Based on the information you provided, it appears that you may participate in work on the development phase of the TMC project as it is considered a new proceeding. See discussion below.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

From September 1996 to the beginning of February 2003, and from May 2003 to July 2003, you served as Deputy District Director for Planning and Local Assistance (CEA-I) for Caltrans-District 8 in San Bernardino, California. From February 2003 through April 2003 you were asked to serve as acting Deputy District Director for Program and Project management (CEA-II) in District 8, while a permanent manager, with a civil engineering license, was selected for this position.

You do not have an engineering license and you do not believe that you made or influenced any decisions about transportation projects while in this assignment. When the CEA II with an engineering license was hired in May 2003, you returned to your planning deputy position until the middle of July, and then began annual leave until your retirement from state service effective November 1, 2003. You have been retired now a little more than eighteen months.

While in the planning deputy position you managed a number of transportation and environmental studies for transportation projects. You also over saw the work of your local assistance branch who works with cities and counties on their locally funded projects, usually off the state highway system. In the summer of 2002 you were assigned responsibility for the planning phase of a project to build a Transportation Management Center (TMC) in the Inland Empire and a Senior Electrical Engineer from Operations Division was assigned to you to manage the project. In December 2002, a consultant contract was issued to the firm of DMJM-Holmes and Narver to prepare a scoping document (project report) and environmental document for the proposed project. The Caltrans project manager who oversaw this work was the Sr. Electrical Engineer previously mentioned. When you were temporarily assigned as acting Deputy for Program/Project Management (2/03), this same Sr. Electrical Engineer was returned to the Operation Division with his TMC project manager responsibilities, and has reported to the Deputy District Director for Operations ever since.

You understand the work was completed by DMJM-Holmes and Narver and the project report approved in March, 2005. This project is now entering the project development phase and the actual architectural design of this building will be done by the Office of State Architect in the State Department of General Services (DGS). Caltrans-District 8 will continue to have project management oversight of the project and the traffic operations and other systems that will be housed in the TMC facility.

You have been recently hired by Lim and Nascimento Engineering Corporation ("LAN") as a Senior Project Manager. In December 2004, LAN Engineering was awarded an on-call consultant contract to perform a project management support services for Caltrans District 8. This occurred more than a year after you left state service. LAN wishes you to perform project management support and other work as part of their contract with Caltrans. This may include project management support on the TMC project scheduled to be designed by DGS beginning in the next few months. It could also include other projects.

ANALYSIS

The Act contains three main post-governmental restrictions on individuals who have recently left public service:

One Year Ban: This would prohibit a public official from appearing for compensation before his or her former agency, or officer or employee thereof, for the purpose of influencing any administrative, legislative or other specified action (including contracts). (See Section 87406, regulations 18746.1 and 18746.2.)

Permanent Ban: This rule prohibits a former state administrative official from advising or representing any person, other than the State of California, for compensation in any judicial, quasi-judicial or other proceeding in which the official participated in while in state service. (See sections 87401-87402, regulation 18741.1); and

Restrictions on Negotiating Prospective Employment: Restrictions on a public official who is negotiating or has any arrangement concerning prospective employment (Section 87407, regulation 18747).

Since you entered the private sector on or about November 1, 2003 – about 19 months ago – we are not addressing the “one-year ban” restriction contained in section 87406 since it does not apply to you. We also do not address restrictions in section 87407 involving influencing prospective employment since the Commission does not provide advice on any past conduct. Thus, we only address the permanent ban provisions of the Act.

The Permanent Ban

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial or other proceeding in which you participated while a state administrative official at Caltrans or any other state agency. (Sections 87401 and 87402.) In other words, a public official may never “switch sides” in a proceeding after leaving state service.

Sections 87401 and 87402 provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.” (Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

Section 87400 defines “*state administrative agency*” as “every state office, department, division, bureau, board and commission, but does not include the Legislature, the courts or any agency in the judicial branch of government.” A “*state administrative official*” is defined under this section as “every member, officer, employee or consultant of a state administrative agency who as apart of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely secretarial or ministerial capacity.”

As a former Deputy District Director for Planning and Local Assistance (CEA-I) and former Acting Deputy District Director for Program and Project Management (CEA II) for Caltrans District 8, you are a former state administrative official for purposes of the Act. Therefore you are subject to the permanent ban. (Section 87400(b).)

Proceedings

Section 87400(c) defines “judicial, quasi-judicial or other proceeding” to include: “...any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.” It includes a proceeding in which state administrative officials participate, but leave state employment before the proceeding concludes.

Participation

Section 87400(d) defines “participated” as meaning “to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental agency staff which do not involving a specific party or parties.”

You state in your letter of May 24, 2005, that you “did not make or influence any decisions about transportation projects” because you did not have an engineering license while as the acting deputy district director for program management. However, regardless of whether you made or influenced decisions with regard to transportation projects, it appears that you have at the very least participated in governmental decisions.

A state employee “participates in making a governmental decision” when he or she negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; advises or makes recommendations to the decision maker, either directly or without significant intervening substantive review; conducts research, makes an investigation, or prepares or presents any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the employee and the purpose of which is to influence the decision. (Regulation 18702.2, copy enclosed.)

In addition, *participation* in a governmental decision *may be direct or inferred* by virtue of an official’s supervisory position. (Regulation 18741.1(a)(4); *In re Lucas*, 14 FPPC Ops. 15; *Brown* Advice Letter, No. A-91-033; *Blonien* Advice Letter, No. A-89-034;.)

You stated in your letter that the last position you held at Caltrans prior to your retirement was that of Deputy District Director for Planning and Local Assistance (CEA-I) and that in this position, you “managed a number of transportation and environmental studies for transportation projects.” You also supervised and provided oversight for the work of your local assistance branch which works with cities and counties on their locally funded projects. In addition, you managed and oversaw the planning phase of a project to build a Transportation Management Center in the Inland Empire. The fact that you had a supervisory position directly responsible for these activities means that you “participated” in these transportation projects.

New Proceeding

The permanent ban does not apply to a “new” proceeding, even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A “new” proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual or legal issues from those considered in previous proceedings. (*Donovan* Advice Letter, No. I-03-119.) We have found generally that proceedings to draft a plan or agreement are different from proceedings involving implementation of the same plan or agreement, or to amend the plan or agreement. For instance, the Commission considers the application, drafting and awarding of a contract, license or approval to be a proceeding separate from the monitoring and performance or implementation of the contract, license or approval. (*Blonien, supra*, No. A-89-463; Reg. 18741.1.)

You state in your letter that in December 2004, your current employer, LAN was awarded “an on-call consultant contract” to perform project management support services

for Caltrans-District 8, including management support on the TMC project in which you had previously participated in the planning phase as a Caltrans employee. The Caltrans contract was awarded prior to your date of hire at LAN, and more than a year after you left your position with Caltrans. Your current position with LAN, as a senior project manager, would entail you providing management support on the development phase of TMC project that is scheduled to be designed by DGS.

Based on the facts you have provided, it appears that the development phase of the TMC project is a “new” proceeding and therefore not part of your permanent ban prohibitions. If you have questions about specific marketing and architectural and engineering projects (“A&E projects”) for Caltrans, you should seek further assistance. Also, you do not provide specific information regarding your new duties. However, if you qualify as a “consultant” for purposes of the Act (Section 82048), the conflict of interest provisions of sections 87100 and 87103 will apply to you. You will be considered a public official for purposes of the Act.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

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